MAYBAN SECURITIES SDN BHD

v.

FUNG LAI CHUEN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-42-1994]
29 MARCH 2002

CIVIL PROCEDURE: *Want of prosecution - Striking out action for want of prosecution - Inordinate delay in filing for summons for directions - Whether an abuse of process of court*

This was the defendants' appeal against the learned senior assistant registrar's order dismissing their application for the dismissal of the plaintiff's action for want of prosecution. The defendants filed their dismissal application following the plaintiff's failure to file a summons for directions after its application for summary judgment was refused. The defendants contended that after having delayed for four years and four months, the plaintiff would continue to delay if the action was not dismissed, and this would amount to an abuse of the process of the court.

Held:

[1] On the facts, the plaintiff's reasons for the delay in taking out the summons for direction were clearly not valid; the only conclusion to be drawn was that, in view of the defendant's counterclaim that it suited the plaintiff not to bring the action to trial, it was reasonable to suppose that the plaintiff would continue to be inactive if the action was not dismissed. Therefore, on the authority of *Grovit v. Doctor*, the delay in filing the summons for directions was an abuse of the process of the court justifying the dismissal of the action for want of prosecution. (pp 183 i & 184 a-f)

[Appeal allowed.]

Case(s) referred to:
Bernard Chai v. Klang Port Authority [1999] 5 CLJ Supp 481 ***(foll)***
Birkett v. James [1977] 2 All ER 801 ***(foll)***
Biss v. Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125 ***(refd)***
Grovit v. Doctor [1997] 2 All ER 417 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 25 r. 1(4)

For the plaintiff - Mohd Aris; M/s Liow Teik Foong & Partners
For the defendants - Lee Kok Chew; M/s Mah Weng Kwai & Assocs

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Mohamad J:

This is the defendants' appeal from an order of the learned senior assistant registrar dismissing their application for the dismissal of the plaintiffs' action for want of prosecution. The plaintiffs' claim is for contra-losses amounting to RM98,548.70 incurred in share-trading on behalf of the first defendant. The second defendant is the guarantor.

The defendants' principal defence is that there was an oral contract between them and the plaintiffs' remisier in charge of the share transactions, Eric Law Nam Poh, that the plaintiffs would not force-sell the shares of Sungei Besi Mines Bhd until the shares reached the price of RM6 per share, but the plaintiffs nonetheless sold the shares in breach of the oral agreement, occasioning loss to the defendants in respect of which they counter-claim a sum of RM168,911.59.

On 21 February 1995 the plaintiffs' application for summary judgment was refused. They should have filed a summons for directions one month after that, but they did not. For that reason, on 22 June 1999 the defendants filed their dismissal application. On 14 July 1999 the plaintiffs filed an application for the transfer of this action to the sessions court. It was dismissed on 13 September 1999 because the plaintiffs' counsel was absent. On 14 October 1999 the plaintiffs filed another transfer application, which is pending.

Although O. 25 r. 1(4) allows a defendant to apply for an order to dismiss the action if the plaintiff fails to take out a summons for directions, no authority has been cited that lays down that the action will be dismissed purely on the basis of the failure and I have not been asked to decide this appeal on that basis. Reference was made in submission to the principles reiterated by Lord Diplock in *Birkett v. James* [1977] 2 All ER 801 at p. 805 a-c:

> The power should be exercised only where the court is satisfied either: (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

There are two limbs, (1) and (2), as to the matters that the court has to be satisfied of.

For limb (1), learned counsel for the defendants relied on "conduct amounting to an abuse of the process of the court". He mentioned the fact that after the defendants filed their dismissal application the plaintiffs filed their transfer application and the fact that the plaintiffs' counsel did not turn up at the hearing of the transfer application as constituting such conduct. I am unable to accept that those facts constitute such conduct. I think that, for the purposes of limb (1), "conduct amounting to an abuse of the process of the court" relates to the "default" mentioned in the limb, which in this case is failure to file a summons for directions for four years four months since 21 March 1995, which for the purposes of limb (2) is undoubtedly an inordinate delay.

In para. 7.5 of his written submission, learned counsel for the defendants said that after having delayed for so long, the plaintiffs would continue to delay if the action was not dismissed, and that would be an abuse of the process of the court. He relied on the following passage by Lord Woolf in *Grovit v. Doctor* [1997] 2 All ER 417 at p. 424 e-h:

> Even without this surprising late development, I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To comence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiffs inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v. James*. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.

It suggests that if by delaying to take the required step you are maintaining an action which you have no intention to bring to trial, it is an abuse of the process of the court.

That takes me to the reasons given by the plaintiffs for the delay in taking out the summons for directions. In para. 4 of their affidavit dated 16 July 1999 the plaintiffs said that they needed time to consider before proceeding further

because their application for summary judgment had been dismissed. In para. 4 of their affidavit dated 21 July 1999 they said that after that application was dismissed, the remisier, Eric Law, resigned from their service and his colleague who took over from him had no knowledge of the case, and that the maker of the affidavit, Lau Wan Koon, the plaintiffs' chief administrative officer, who took over after that, needed time to discuss the merits of the case with the plaintiffs' solicitors.

As reasons to excuse the delay, clearly those reasons fail. But what I am going to say is for the purpose of the question of abuse of process. It is clear from those reasons that the plaintiffs were not attempting to look for Eric Law to be their witness. If the action were brought to trial it would be a trial on the evidence of documents, as the plaintiffs themselves said it would be in para. 7(a) of their affidavit dated 16 July 1999, without the presence of Eric Law. But they would be faced with the defendants' counterclaim for which the defendants would rely on their own evidence to prove the oral agreement with Eric Law, in which the plaintiffs would not have the evidence of Eric Law to rebut. That could be the only reason why, according to the plaintiffs, they needed time to consider before proceeding further because their application for summary judgment had been dismissed, and why, according to Lau Wan Koon, he needed to discuss the merits of the case with the plaintiffs' solicitors. But even the need to consider and to discuss with solicitors is suspicious because it should not have taken so many years to do that. The only conclusion to be drawn is that in view of the defendants' counterclaim it suited the plaintiffs not to bring the action to trial, so that is it reasonable to suppose, as submitted by the defendants' counsel, that the plaintiffs would continue to be inactive if the action was not dismissed. I think, therefore, on the authority of *Grovit*, that the delay in filing the summons for directions is an abuse of the process of the court justifying the dismissal of the action. I therefore allow the appeal, set aside the order of the senior assistant registrar, and dismiss for want of prosecution the plaintiffs' action with costs.

I would not dismiss the application on the basis of limb (2) in *Birkett v. James* because I am not satisfied that a fair trial will not be possible because of the delay or that the delay has caused serious prejudice to the defendants. The defendants mention their problem with documents and witnesses, but have not given particulars of the problem. Since the defendants are counterclaiming, I do not see why they would not have continued to keep the documents that they need to rely on for their defence and counterclaim. As to witnesses, the defendants themselves are going to be their own witnesses. No other witnesses have been mentioned. I do not see any problem with memory.

The defendants also rely on prejudice as in *Biss v. Lambeth, Southwark and Lewisham Health Authority* [1978] 2 All ER 125, which in *Bernard Chai v. Klang Port Authority* [1999] 5 CLJ Supp 481 I called "democletian prejudice". For the reasons given in that case I hold that the defendants are not entitled to rely on such prejudice.